

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERT H. BEIDLER,

Defendant-Appellant.

UNPUBLISHED

January 26, 2001

No. 212483

Oakland Circuit Court

LC No. 97-152647-FH

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), which arose out of the sexual touching of his eleven-year-old stepdaughter. The trial court sentenced him to two concurrent terms of two to fifteen years' imprisonment. We affirm.

I

Defendant first argues that the prosecutor committed misconduct requiring reversal by attempting to elicit inadmissible, prejudicial testimony about defendant's purported sexual relationship with the victim's teenage sister. Before trial, the trial court ruled that evidence of this relationship was inadmissible under MRE 404(b) because of the danger of unfair prejudice. Defendant contends that the prosecutor improperly attempted to introduce the prohibited evidence when he asked the victim's sister whether defendant gave her back rubs, whether he did it frequently, and whether he did it at night.

We review a prosecutor's allegedly improper comments or questions in the context they were made to determine if they deprived the defendant of a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defense counsel asked the victim during cross-examination if defendant rubbed her back, how often, and when. The victim testified that defendant had rubbed her back many times before she went to sleep. On direct examination, the prosecutor asked the victim's sister whether defendant gave her back rubs as well, and she answered affirmatively. The prosecutor's questioning of the victim's sister in this manner did not rise to the level of prosecutorial

misconduct requiring reversal. First, the victim's credibility was at issue in the case, and the prosecution's questions to the victim's sister lent credibility to the victim's claim that defendant routinely rubbed her back. Second, the sister's testimony regarding back rubs actually *supported* defendant's theory of the case: i.e., that he routinely rubbed the victim's back but never touched her in a sexual manner. Third, the sister's testimony regarding back rubs was brief, and the jury was directed by the court to disregard it. Finally, the prosecutor's question did not hint or imply that defendant may have sexually assaulted the victim's sister. Under these circumstances, no prejudicial error occurred.

Defendant also argues that the prosecutor committed misconduct requiring reversal when he asked a police officer about an interview she had with defendant. The officer testified that she spoke with defendant in November 1996. Although the record is unclear regarding why this conversation took place (the sexual assaults at issue here were not reported until February 1997), the context suggests that the conversation related to a domestic dispute. The officer testified that she and defendant talked about the way defendant ran his household. According to the officer, defendant told her that his wife did not appreciate that he spent time with the victim's sister. The prosecutor then asked:

Q. And when you talked to him on that day, did you ask him any questions about a relationship between a stepfather and a stepdaughter?

A. Yes, I did.

Q. What did you ask him?

A. I asked him a question that what would [sic] – what do you think should happen to a stepdad that is sexually molesting his fourteen year old stepdaughter?

Defense counsel immediately objected on grounds of relevancy, and the trial court sustained the objection.

The conversation between the officer and defendant was explored more fully during the making of a special record outside the jury's presence. Defendant apparently told the officer that a sexual relationship between a stepfather and a fourteen-year-old stepdaughter was okay, as long as the relationship was consensual. Defendant apparently also told the officer that it was not okay for a father to have sex with his own children but that a stepchild was not in the bloodline and a consensual sexual relationship with a stepchild was therefore acceptable.

The prosecutor argued that defendant's statements demonstrated defendant's state of mind in November 1996, when he allegedly committed the instant crimes, and that they were admissions. Defense counsel argued that the line of questioning was a back-door attempt to bring in inadmissible evidence that defendant had a sexual relationship with the victim's sister.

The trial court stated that it had difficulty accepting the prosecutor's rationale that the question showed defendant's state of mind, because defendant was never asked about a sexual relationship with an eleven-year-old but only with a fourteen-year-old. The court also indicated

that defendant's response to the hypothetical question posed by the officer in November 1996 would be more prejudicial than probative even if it was admissible to show state of mind. Accordingly, the trial court refused to change its ruling sustaining the objection, and when the jury returned to the courtroom, the prosecutor moved to an entirely different line of questioning.

On appeal, defendant argues that the prosecutor's questioning was a planned attempt by the prosecutor to elicit the inadmissible testimony that defendant was sexually involved with the victim's sister. Defendant argues that the jury probably made the connection that defendant was involved with the victim's sister and that this constituted harmful error. We disagree that any error requiring reversal occurred. The prosecutor was not trying to elicit testimony about the relationship between defendant and the victim's sister but was trying to elicit testimony about defendant's attitudes and incriminating statements regarding the acceptability of stepparent and stepchild sexual relationships. This testimony was arguably relevant to whether defendant intentionally touched the victim and whether that touching could "reasonably be construed" as being for a sexual purpose – elements that the prosecution was required to prove. See *People v Piper*, 223 Mich App 642, 646-647; 567 NW2d 483 (1997).

"[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the Court, as long as that attempt does not prejudice the defendant." *Id.* at 660-661. Here, although defendant claims the prosecutor acted in bad faith, defendant has not demonstrated bad faith, as discussed above. Indeed, the question posed by the prosecutor was not designed to elicit forbidden testimony. Defendant has also failed to demonstrate prejudice that deprived him of a fair trial. See *Truong, supra* at 336 (reversal based on prosecutorial misconduct is appropriate only if the defendant was deprived of a fair and impartial trial). The jury was informed by defense counsel, in the course of making his objection, that the question referenced by the police officer was theoretical. Defense counsel's objection was sustained, so the police officer did not in fact reveal defendant's attitude toward stepfather-stepdaughter relationships. No evidence of a sexual relationship between defendant and the victim's sister was introduced. Moreover, the jury was instructed that its verdict could be based only on the evidence and instructions and that the lawyers' questions were not evidence. Under these circumstances, we find no basis for reversal.

II

Next, defendant argues that his trial attorney rendered ineffective assistance of counsel in four separate instances. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's error or errors, the result of the proceedings would reasonably have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant must overcome a presumption that the challenged action constituted sound trial strategy, *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), and defense counsel is not required to make frivolous or meritless motions or objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998); *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Here, because defendant did not raise the issue of ineffective

assistance of counsel in the trial court, this Court's review is limited to errors apparent from the existing record.¹ *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant first contends that his counsel improperly failed to use a peremptory challenge to remove a certain juror from the jury. A lawyer's decision about which jurors to accept or strike is a strategic and tactical decision. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). "A lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury." *Id.* Defendant has failed to overcome the presumption that trial counsel's decision to retain the juror at issue was sound trial strategy. More significantly, the juror at issue never deliberated in this case because he was excused as an alternate before deliberations. Thus, defendant cannot show that but for defense counsel's failure to remove the juror, the result of the proceedings would have been different.

Defendant next contends that counsel improperly failed to object to certain questioning on grounds other than relevancy. Counsel objected on the basis of relevancy when the prosecutor questioned the victim's sister about whether defendant gave her back rubs at night. The trial court sustained the objection and told the jury to disregard the question. Given that counsel's objection served the desired purpose (by precluding the testimony), defendant's argument that a different objection would have been more appropriate is without impact. Indeed, defendant cannot make the requisite showing that if defense counsel had objected on different grounds, the result of the proceedings would reasonably have been different.²

Defense counsel again objected on relevancy grounds when the prosecutor elicited that the police officer asked defendant what he thought should happen to a stepfather who is sexually molesting his fourteen-year-old stepdaughter. The objection was prompt and had the desired effect of precluding the testimony. Defendant contends on appeal that his counsel should have objected on the ground that the prosecutor was improperly soliciting evidence already deemed inadmissible. This contention is without merit, because (1) the relevancy objection obtained the desired effect of precluding the testimony, and (2) defense counsel did in fact object, after the jury left the courtroom, on the grounds preferred by defendant.

Defendant next argues that his counsel should have renewed an objection to a certain line of questioning. The prosecutor questioned the victim's sister generally about telephone contacts she had with defendant after the investigation in this case began. At one point, after an objection by defense counsel on relevancy grounds, the prosecutor argued that the testimony was relevant because defendant had threatened the sister during these contacts. The trial court overruled defendant's objection. Defendant contends on appeal that because the ensuing questioning did

¹ We decline defendant's request to remand this case for an evidentiary hearing; there is no indication that an evidentiary hearing would provide factual support for defendant's arguments.

² We further note that the objection that defendant claims counsel should have made, i.e. that the prosecution was attempting to elicit forbidden evidence, might have caused the jury to become suspicious that there was other conduct about which they were not being informed. It was therefore *prudent* for defense counsel not to have raised such an objection, at least in front of the jury.

not in fact reveal any threats by defendant, defense counsel should have renewed his objection to the testimony. We disagree, because the ensuing questioning did in fact reveal a veiled threat. Indeed, the witness' testimony suggested that defendant had been surveilling the witness' house, knew that she was home alone, and wanted to scare her. "Evidence of a defendant's threat against a witness is generally admissible as conduct that can demonstrate the consciousness of guilt." *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Because the evidence was admissible, defense counsel was not ineffective for failing to renew his objection to it; counsel was not required to make a frivolous objection. *Torres, supra* at 425.

Defendant's final contention with regard to his ineffective assistance claim is that his attorney improperly failed to move for a directed verdict. We disagree.

A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. [*People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).]

In ruling on a motion for a directed verdict, a trial court may not determine the credibility of witnesses, "no matter how inconsistent or vague that testimony might be." *Mehall, supra* at 6. In this case, there was no question that the victim's testimony, if believed, established the essential elements of the crime. Thus, a motion for a directed verdict would not have been successful. Defense counsel was not required to make a frivolous motion. *Darden, supra* at 605.

III

Finally, defendant argues that the trial court imposed disproportionate sentences. We disagree. We review a trial court's sentencing decisions for an abuse of discretion. *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

Here, defendant's sentences fell within the applicable sentencing guidelines range and therefore are presumptively proportionate. *People v St John*, 230 Mich App 644, 650; 585 NW2d 849 (1998). We have reviewed the record and conclude that defendant has failed to overcome this presumption of proportionality. Indeed, defendant has not presented any unusual circumstances that would render the sentences disproportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Contrary to defendant's implication, defendant's lack of a prior criminal record does not constitute an unusual circumstance sufficient to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995). We are satisfied that defendant's sentences reflect the seriousness of the circumstances surrounding the offenses and the offender. *Crawford, supra* at 621; *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter